THE ATTORNEY GENERAL OF TEXAS

October 30, 1987

JIM MATTOX
ATTORNEY GENERAL

Ms. Nanette G. Williams
Assistant City Attorney
2 Civic Center Plaza
El Paso, Texas 79999

Open Records Decision No. 482

Re: Whether information within section 3(a)(6) of the Open Records Act, article 6252-17a, V.T.C.S., becomes public after adoption of the proposed legislation and related questions

Dear Ms. Williams:

The city of El Paso has received a request for the following information:

1. Complaint concerning 801 S. Santa Fe Street, dated on or about June 13, 1985, leading to El Paso Fire Department's Notice of said date.

2. All information concerning the employment and personnel record of Inspector Charlie E. Kiser, retired, which is not privileged.

3. All information concerning the employment, personnel record evaluation, and performance record of Assistant City Attorney, Mr. Herb Fleming, which is not privileged.

4. Complaint concerning 820 S. El Paso Street, dated April 28, 1987; and

5. All information concerning the drafting of El Paso City Ordinance #8860, dated November 25, 1986, including the names of the drafters.

Your request letter stated:

> The Fire Department has told me that the first document does not exist and I have advised the requestor that I cannot produce it. In my opinion, the request put forward in the second and third paragraphs is too vague. . . . I have, therefore, asked the requestor to narrow the scope of his inquiry. I have supplied an edited copy of the complaint described in the requestor's fourth paragraph. Noting that the City has in the past inadvertently transmitted a copy of the complaint to the requestor's attorney, I enclose, for your review, copies of the complaint as it appears in our records and a copy of the complaint as edited by me to delete references to the complaining witness pursuant to the informer's privilege under Section 3(a)(1) as information deemed confidential by law. In response to the requestor's fifth request, I have declined to produce documents and advised him that I believe work papers and drafts of the ordinance are exempt under Section 3(a)(6) of the Open Records Act.

In a subsequent letter, you advised:

> The [requestor's] 'narrowed scope of inquiry' relating to [the] second request is as follows: 'All documents, writings, letters, memoranda or other written, printed, typed, copied or developed materials in the personnel files of Charlie E. Kiser which would not constitute an unwarranted invasion of personal privacy, including but not limited to full name, ethnicity, salaries, title, dates of employment, performance records, and evaluations, and complaints against the employee.' I have agreed to supply all documents . . . with the following exceptions:
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> 1. His home address and telephone number in accordance with §3(a) because Mr. Kiser has so requested.
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> 2. Certain medical records which I believe constitute an unwarranted invasion

> of personal privacy and should be considered exempt pursuant to §3(a)(2).
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> 3. All performance evaluation reports and other intra-agency memoranda containing recommendations of the rating and reviewing officers because I consider them exempt under §3(a)(11).
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> . . . .
>
> . . . [T]he requestor has narrowed the scope of his [third] request as follows: 'all documents, writings, letters, memoranda, or other written, printed, typed, copied or developed materials in the personnel files of Charlie E. Kiser which would not constitute an unwarranted invasion of personal privacy, including but not limited to, full name, ethnicity, salaries, title, dates of employment, performance records and evaluations and complaints against the employee.'
>
> I find no information concerning the performance of Assistant City Attorney, Mr. Herb Flemming, in the personnel files of Charlie E. Kiser. I have so advised the requestor and asked him to clarify this request.

If the document mentioned in item one of this request does not exist, the city cannot produce it. Regarding the third item, it is apparent that the requestor mistakenly referred to Charlie E. Kiser rather than to Herb Flemming. Without further delay, therefore, the city should inspect its files relating to Flemming and decide whether it wishes to withhold any information in them. If it does, it must submit that information to this office for review. V.T.C.S. art. 6252-17a, §7(a).

You stated that you released the fourth item requested, except to the extent that it identified the complaining witness. As a rule, however, the names of complainants are public information. Houston Chronicle Pub. Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App. - Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Only in unusual instances, such as where the complainant was the victim of a sexual assault, see

Open Records Decision No. 339 (1982), may the identity of a complainant be withheld. In this case, there is no unusual circumstance that would justify withholding the name of this complainant.

Turning to the second item, the city may withhold Kiser's home address and telephone number. Kiser retired in 1986, and in Open Records Decision No. 455 (1987), we construed sections 3A and 3(a)(17) of the Open Records Act and said that "if, while still employed, a governmental employee elects to protect his home address and telephone number from disclosure, the governmental body may not disclose this information after the employment relationship ends." The information submitted shows that Kiser complied with the requirements of section 3A of the act while he was still employed.

As for the medical records, section 3(a)(2) excepts information only if its release would cause an invasion of privacy within section 3(a)(1) of the act. Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.). You have not indicated which portions of Kiser's personnel file should be withheld on privacy grounds. This file contains the results of medical examinations, and we shall assume that you wish to withhold only this information.

These documents are signed by physicians. Section 5.08(b) of article 4495b, V.T.C.S., provides:

> Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

Acts 1981, 67th Leg., 1st C.S., ch. 1, at 31. Recent action by the Texas Legislature, the Texas Supreme Court, and the Texas Court of Criminal Appeals, however, has left the status of this section unclear. The 1987 pocket part to Vernon's Texas Civil Statutes, moreover, describes section 5.08 as having been "repealed."

In 1939, the legislature authorized the Texas Supreme Court to promulgate rules governing practice and procedure in civil actions in Texas courts. Acts 1939, 46th Leg., ch. 25, §1, at 201. This law, originally codified as

article 1731a, V.T.C.S., is now found in section 22.004 of the Texas Government Code, which provides in part:

> (c) So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed.

On November 23, 1982, the Texas Supreme Court promulgated an order, effective September 1, 1983, which adopted new Texas Rules of Evidence. See 46 Tex. B. J. 197 (1983). This order included section 5.08 among statutes deemed to be "repealed insofar as they relate to civil actions."

In 1985, the legislature enacted article 1811f, V.T.C.S. Acts 1985, 69th Leg., ch. 685, at 2472. This statute authorized the Court of Criminal Appeals to "promulgate a comprehensive body of rules of posttrial, appellate, and review procedure in criminal cases," section 2, and provided that the court has "full rulemaking power in the promulgation of rules of evidence in the trials of criminal cases," section 5. Section 9(a) authorized the court to "designate for repeal" certain laws, including section 5.08 of article 4495b, if prescribed steps were followed. By order dated December 18, 1985, effective September 1, 1986, the court adopted new Rules of Criminal Evidence. See 49 Tex. B. J. 220 (1986). This order included section 5.08 among statutes "designated for repeal as they relate[d] to criminal cases and criminal law matters. . . ."

These court orders purport to repeal section 5.08 only insofar as it relates to "civil actions" and "criminal law matters." An inquiry to determine if the Open Records Act permits public access to records prepared by a physician fits in neither category. In addition, language in the relevant rules of evidence establishes that the Supreme Court and the Court of Criminal Appeals sought to repeal section 5.08 only to the extent that it affects civil and criminal actions. Rule 509 of the Rules of Criminal Evidence provides, "There is no physician-patient privilege in criminal proceedings," and rule 1101(b) states, "These rules with respect to privileges apply at all stages of all actions, cases, and proceedings." The comment to rule 509 of the Texas Rules of Evidence states:

> This rule only governs disclosures of patient-physician communications in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by Tex. Rev. Civ. Stat. Ann. art. 4495b, Sec. 5.08.

We therefore conclude that section 5.08 has not been entirely "repealed."[1] Apart from its status in civil and criminal actions, section 5.08 remains valid for purposes of determining the right of the public to obtain records created and maintained by physicians which reflect the identity, diagnosis, evaluation, or treatment of a patient. The documents at issue here are within this section, and are therefore "confidential" within section 3(a)(1) of the Open Records Act. See Crocker v. Synpol, Inc., 732 S.W.2d 429 (Tex. App. - Beaumont 1987, writ request withdrawn).

Pursuant to section 3(a)(11) of the act, you also wish to withhold the "performance evaluation reports and other intra-agency memoranda containing recommendations [pertaining to Kiser] of the rating and reviewing officers[.]" We recently discussed the scope of section 3(a)(11) protection in a similar situation. In Open Records Decision No. 464 (1987), which dealt with faculty evaluations of administrators of Pan American University, we said:

> [T]he anonymous evaluations at issue here may be divided into two categories: declarative statements with a letter answer and narrative statements. You indicate that the university is considering releasing to the public a statistical compilation of the responses to the declarative statements. . . . [I]f Pan American University has compiled a survey of the responses to the declarative statements on the evaluation in question, it must release that compilation. . . .

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1. We express no opinion as to the effectiveness of the two court orders. See generally Tex. Const. art. II, §1; art. V, §31.

> For similar reasons, the declarative statements with a letter response . . . must also be released. Although these responses may reflect the subjective opinion of the evaluator, their release will not impair the deliberative process at the university because the questions are anonymous. As indicated, the purpose of exception 3(a)(11) is to encourage open and frank discussion in the deliberative process. Information may therefore be withheld under section 3(a)(11) if release of the information would impair the government's ability to obtain the information in the future. [Citations omitted.] Release of anonymous standardized responses will not reveal the identity of the evaluator and, therefore, will not prevent evaluators from providing similar opinions in the future. . . .
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> The narrative responses . . . present a different question. Because release of these responses could identify the individuals making the evaluations and recommendations, these responses may be withheld under section 3(a)(11). Although the narrative responses are anonymous, releasing them could reveal the identity of the evaluators. For example, some of the evaluations are handwritten and some criticize attitudes which may apply only to some faculty members.

The evaluations before us contain subjective responses to declarative statements and opinions of various observers. They are signed by the raters. If disclosure of these reports with the identities of the raters deleted would not enable anyone to ascertain those identities, the reports must be disclosed with the identifying material deleted. As Open Records Decision No. 464 explained, section 3(a)(11) insures the ability of a governmental body to obtain candid opinions, evaluations, and recommendations so that its deliberative processes will be frank and effective. That goal is not defeated where the disclosure of evaluations, even entirely subjective ones, would not enable the identity of the evaluator to be ascertained.

If the city believes that the disclosure of these evaluations would enable the raters' identities to be determined, it must so advise us within five (5) days. Otherwise, these forms must be disclosed in this manner.

The remaining issue concerns item five. Your supplemental letter states:

> In connection with [this item, the requestor] has stated that 'since Ordinance 8860 is not proposed legislation but enacted legislation, your bald statement that such drafts are exempt from disclosure would appear to be spurious.' I will appreciate your opinion as to whether drafts and working papers involved in the preparation of proposed legislation become public information upon adoption of the legislation.

Section 3(a)(6) of the act excepts "drafts and working papers involved in the preparation of proposed legislation." The legislative history of this section sheds no light on its intended meaning. We therefore turn to prior decisions of this office for guidance in applying it.

In Open Records Decision No. 460 (1987), we said:

> In Open Records Decision No. 248, this office held that section 3(a)(6) protects drafts of a municipal ordinance or resolution which reflect policy judgments, recommendations, and proposals. The purpose for the exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the legislative body. Accordingly, section 3(a)(6) does not except purely factual information. [Citations omitted.] On the other hand, a comparison or analysis of facts prepared to support proposed legislation is within the ambit of section 3(a)(6).

In Open Records Decision No. 429 (1985), we said:

> Section 3(a)(6) as construed in Open Records Decision No. 248 involves the internal deliberative processes of a governmental

> body relevant to the enactment of legislation. The governmental interests and the kind of documents it protects resemble those protected by section 3(a)(11). Like section 3(a)(11), section 3(a)(6) has been construed to be inapplicable to information basically factual in nature. [Citations omitted.] Section 3(a)(6) is made specifically relevant to the legislative process, but we believe it is sufficiently similar to section 3(a)(11) that prior decisions interpreting section 3(a)(11) may be helpful in determining the scope of section 3(a)(6).

These decisions establish that sections 3(a)(6) and 3(a)(11) were designed to achieve the same goals in different contexts. Because the policies and objectives of each exception are the same, we may rely on decisions applying section 3(a)(11) in a situation such as this one to determine how section 3(a)(6) should be construed.

In Open Records Decision No. 137 (1976), this office considered the extent to which section 3(a)(11) protects advice, opinion, and recommendation after the governmental decisionmaking process has ended. The decision stated:

> [The report in question] is clearly a post-decisional document explaining the reasons why a particular policy was adopted. We have previously indicated that section 3(a)(11) is based on the similar exception in the federal Freedom of Information Act. Attorney General Opinion H-436 (1974). We are guided by the federal courts, which have drawn a clear distinction between pre-decisional and post-decisional documents, applying the federal Freedom of Information Act intra-agency memorandum exception to the former, but not the latter. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-152 (1975). We agree with the reasoning of the federal courts that the great public interest in knowing the basis for agency policy already adopted renders the intra-agency memorandum exception inapplicable to this type of information.
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> Another principle developed by the federal courts in interpreting and applying

> their intra-agency memorandum exception seems applicable in this case. That principle is that when an agency chooses to adopt or incorporate by reference an intra-agency memorandum in explaining the basis of a decision made, then the exception is waived and the information to which it referred must be made public. Any such document referred to as the basis of a decision must be disclosed unless it falls within some other exception.

Implicit in this decision is the idea that although the governmental interest in a frank and open decisionmaking process justifies the withholding of advice, opinion, and recommendation even after that process had ended, the protection afforded by section 3(a)(11) is waived where an entity incorporates that information in a final document which is disclosed to the public or in materials which explain to the public the basis for a decision it makes. We believe the same approach should be taken in matters involving section 3(a)(6). In this instance, therefore, we conclude that this section protects working papers involved in the preparation of this ordinance, except to the extent that application of the principles stated in Open Records Decision No. 137 requires the conclusion that this protection has been waived. We do not believe that this section excepts the names of the drafters of the ordinance.

S U M M A R Y

> Section 3(a)(6) of the Open Records Act protects working papers involved in the preparation of legislation even after the legislation is enacted, except to the extent that application of principles stated in Open Records Decision No. 137 (1976) requires the conclusion that this protection has been waived. Section 5.08 of article 4495b, V.T.C.S., protects certain medical information in the personnel files at issue here. Section 3(a)(11) does not permit performance evaluation reports to be withheld if their disclosure, with the identities of the evaluators deleted, would not enable the public to ascertain those identities. The city may not withhold the

name of a complainant who filed a report with the fire department.

Very truly yours,

Jim Mattox

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